No. 17-494

# In the Supreme Court of the United States

SOUTH DAKOTA,

*Petitioner*,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

*Respondents.*

On Writ of Certiorari to the Supreme Court of South Dakota

## BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICUS CURIAE* [1]

*Amicus Curiae* the Competitive Enterprise Institute ("CEI") is a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI engages in policy research, litigation, and education in the areas of property rights, markets, free enterprise, and liberty.

## STATEMENT

Before overruling precedent, it is important to evaluate that precedent from a broader constitutional perspective. Precedents that may seem doubtful in isolation may nonetheless merit retention insofar as they compensate for earlier errors in the law. *See McDonald v. City of Chicago*, 561 U.S. 742, 756-58 (2010) (despite narrow reading of Privileges and Immunities Clause being widely considered " 'egregiously wrong,' " no need to reconsider interpretation where work of incorporation was being done by the Due Process Clause); *id.* at 791 (Scalia, J., concurring) (acquiescing, despite "misgivings," in incorporation via the Due Process Clause); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 636 (1997) (Thomas, J., joined by Scalia, J., dissenting) (noting deep disagreement with negative Commerce Clause jurisprudence, that "much of what the Import-Export Clause appears to have been de-

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the written blanket consent of all parties, on file with this Court.

signed to protect against has since been addressed under the negative Commerce Clause," and that "[w]ere it simply a matter of invalidating state laws under one clause of the Constitution rather than another, I might be inclined to leave well enough alone."); *cf. Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., joined by Thomas, J., dissenting) (noting it is "perhaps just as well" that broad qualified immunity arose given that it compensates for erroneous broadening of § 1983; "Applying normal common-law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress could have enacted.").

The physical-presence rule of *National Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), is best viewed as such a second-best, compensatory rule. While the decisions behind that rule may look odd or inconsistent on their own narrow terms, they fill an erroneously vacated niche in the constitutional order. *Quill's* physical-presence rule helps maintain the essential territorial aspects of federalism that were meant to order horizontal relations between the States but that have been weakened by earlier mistakes in constitutional jurisprudence.

The broader constitutional perspective is an essential counterpoint to the tendency to consider cases only in their narrow and legal and factual context. The competing economic and political interests in this case naturally emphasize the immediate economic and administrative consequences of revising, or not, this Court's decision in *Quill*. Structural constitutional principles recede into the background. Howev-

er, an intimate connection between economic interest and state authority has been with us from the beginning. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), was a quarrel among business enterprises. And yet, it was decided in light of high constitutional principle. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), was a seemingly narrow dispute about a state-imposed business tax, but it, too, prompted this Court's serious reflection on the nature of the Union, and its federalism.

This case should be decided from that same broader perspective. Properly viewed in constitutional context, *Quill*'s physical-presence rule is not merely an arbitrary protection for some participants in interstate commerce; it is an essential, albeit imperfect, element of the horizontal aspect of the Constitution's federalism. Whatever the shifting doctrinal pedigree of that rule, the rule itself remains constitutionally sound as a means of enforcing federalism principles otherwise eroded by earlier flawed precedent. To uproot such gap-filling precedent without also revisiting in some way the earlier gap-creating precedent would leave the law at odds with the overall constitutional text and structure.

## SUMMARY OF ARGUMENT

This case involves federalism in both of its dimensions: vertical, between the States and the general government; and horizontal, between and among the States. Nobody disputes that Congress could legislate federal "rules of the road" regarding taxation and tax collection on interstate commerce. The question

is, what default rules should govern in the absence of affirmative congressional intervention.

Contemporary federalism doctrine emphasizes the vertical "balance" between the States, collectively, and the general government. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); Robert J. Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 97-103 (2004). This perspective tends to distract from the Constitution's commands with respect to *horizontal* state-to-state conflicts and the judiciary's role in enforcing horizontal federalism rules. Due attention to the Constitution's structure of horizontal federalism, however, supports maintaining or even strengthening *Quill*'s physical-presence rule; not necessarily on its own reasoning, but as a suitable embodiment of territorial limitations of horizontal federalism, at least until the related missteps that necessitated such a rule can be adjusted to preserve the overall structure of horizontal federalism.

1. The text and structure of the Constitution show that the Founders understood federalism as having both vertical and horizontal elements. The Constitution organizes horizontal relations among States on principles of (partial) state autonomy, equality, territoriality, non-aggression, and mutual recognition, and it assigns to the judiciary a prominent role in maintening that order. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250-51 (1992). The intended result of that arrangement is a *competitive* federalism order: citizens of the United States choose their State, not the other way around.

a. Horizontal federalism is profoundly territorial: States are territorial, and they are equal for constitutional purposes. These principles, firmly enshrined in the Constitution's architecture and in numerous specific provisions, logically entail a prohibition against the *extra*-territorial exercise of state power. Each State's sovereign authority over its own territory and citizens must be consistent with, and therefore limited by, each other State's equal authority. *See, e.g.*, *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). While the horizontal limits of state authority are not always easy to identify, the irreducible constitutional necessity of such limits remain.

b. Two fundamental components of horizontal federalism in the text and structure of the Constitution involve the mobility of persons and businesses and national access to interstate markets.

Mobility is protected by the Privileges and Immunities Clause of Article IV, section 2, and by section 1 of the Fourteenth Amendment, which ensure that persons may move freely between the States, may not be discriminated against based on their State of origin, and may relocate and become citizens of whichever State they choose. Access to interstate markets is ensured by delegation of power over interstate commerce to the national government and by various restrictions on market impediments, notably including a prohibition on unauthorized state Imposts and Duties on Imports and Exports. U.S. CONST., art. I, sec. 8, cl. 3; *id.*, art. I, secs. 9 & 10. Because many of the limitations are self-executing, the Constitution necessarily assigns the judicial branch,

and this Court in particular, a prominent role in enforcing the safeguards of horizontal federalism.

c. Horizontal federalism turns out to be highly competitive. The structure of horizontal federalism – unimpeded mobility across state lines; nondiscrimination; prohibitions against extraterritorial taxation and regulation – promotes and ensures independent States that must compete for citizens and businesses. States can compete on the scope and quality of their laws, the scope and quality of their services, and, critically, on the burden of their taxation.

State competition for productive citizens and enterprises is among federalism's foremost, and intended, advantages. *Gregory v. Ashcroft*, 501 U.S. at 458. Competition acts as a check on States overreaching or colluding with some or all of their sisters against the interests of citizens or of other States. Just as competition among rival political groups provides protection against the evils of factionalism and against the most dangerous faction of all, the "superior force of an interested and overbearing majority," Federalist No. 10, THE FEDERALIST 55 (Easton Press 1979; Carl Van Doren, ed.), competition among States provides a safeguard against factional abuse within and among those States.

2. Notwithstanding the critical role of horizontal federalism in maintaining the constitutional order, various of its foundations have been eroded by unfortunate decisions overlooking this broader perspective. In several instances, central constitutional provisions designed to prevent state-to-state conflicts have lost much of their force due to judicial misconstruction. *See, e.g., Woodruff v. Parham*, 75 U.S. (8 Wall.) 123

(1869) (Import-Export Clause); *Home Bldg. & Loan Asso. v. Blaisdell*, 290 U.S. 398 (1934) (Contract Clause); *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (Compact Clause); *Allstate Insurance Co. v. Hague*, 449 U.S. 311 (1981) (Full Faith and Credit Clause, Due Process Clause).

The market-access protections of the Import-Export Clause, for example, were narrowed to foreign imports and exports, *Camps*, 520 U.S. at 621-36 (Thomas, J., dissenting), mistakenly excluding interstate commerce and the imposition of taxes thereon. The Contract Clause also was narrowly construed, with the effect of depriving out-of-state creditors of constitutionally intended protection. *See Blaisdell*, 290 U.S. at 434-36, 439-40; Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 284-85, 293-94 (1988) (Hamiltonian view of Contracts Clause was to protect contracts involving interstate commerce). And territorial contraints on state projection of power were weakened by expanding notions of judicial and regulatory jurisdiction that made it harder for citizens and businesses to exit or escape from any given State's control without forfeiting access to interstate markets. *Quill*, 504 U.S. at 307-08 (discussing change in due process jurisprudence away from "more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry" involving forseability and general fairness).

Despite the erosion of various supports for horizontal federalism, the Constitution's genius and logic could not be suppressed entirely. Rather, echoes of

those foundational principles often manifest themselves through alternative, if somewhat ill-fitting and less coherent, clauses and doctrines such as the dormant Commerce Clause. Viewed in isolation, that doctrine and many of its particular progeny may seem doubtful, or worse. *See, e.g., Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 259-60 (1987) (Scalia, J., concurring in part and dissenting in part). However, viewed in broader constitutional context and against the erosion of textually and structurally grounded doctrines, the dormant Commerce Clause can serve a vital compensatory function. *Quill*'s physical-presence rule is one example of a compensatory doctrine maintaining some of the territorial foundations of horizontal federalism. To review *Quill*'s physical-presence rule in isolation from the constitutional context, would miss the forest for the trees. *Amici* respectfully submit that a second-best, under-theorized rule is better than no constitutional rule at all.

Providing default rules consistent with the constitutional structure has been, and remains, a quintessentially judicial task. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 293-94 (1980) (noting Court's role in applying due process to ensure that "the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system" and in enforcing " 'territorial limitations on the power of the respective States.' ") (citation omitted). This Court should take the opportunity presented in this case to re-assert, rather than bury, the basic precepts of constitutional order.

3. Allowing the physical-presence rule to remain the judicially enforceable default limit on state projection of power over out-of-state sellers is the best practicable means of enforcing some of the structural principles of horizontal federalism. The physical-presence rule would have a more sensible grounding if defended based on constitutional antipathy to extraterritorial state action and constitutional support for open access to interstate markets and the ability of persons and businesses to escape particular state jurisdiction as prerequisite to competitive checks on state power.

*Amici* recognize that the dormant Commerce Clause often has been defended by ever-changing policy considerations and suspiciously legislative *ad hoc* balancing. But petitioner's current attack on *Quill* likewise relies on that same questionable approach. While changeable policy determinations are best left to Congress, core horizontal federalism principles barring extraterritorial taxation or regulation of interstate commerce should be the default rule enforced by the Courts in the first instance. And a physical-presence or territoriality principle should be the minimum default rule for any of the tax-collection issues in this case.

Whatever the internal flaws of *Quill*, the concerns animating respect for precedent still support leaving it in place, at least until a more encompassing reconsideration of horizontal state power is possible. Selectively disposing of that precedent, without revisiting the earlier questionable precedent for which it compensates, ensures nothing more than a cosmetic consistency in a narrow area of the law at the cost of

worsening a broader inconsistency in the Constitution's structure and operation. Furthermore, businesses have relied upon the existing precedent when structuring their operations and when choosing where to locate physical facilities and how to conduct their interstate commerce. Indeed, such choices exactly reflect the mobility and exit options that allow competition among the States and that horizontal federalism was designed to foster. Those locational choices had financial and practical consequences, led to investments that might not otherwise have been made under a different rule, and will now have further costs if the rule is reversed.

This Court should decline to abandon *Quill*'s physical-presence rule and should affirm.

## ARGUMENT

The fundamental contention of this *amicus* brief is that the text and structure the Constitution establish a horizontal federalism whereby citizens and the States themselves are protected not merely against the centralized power of the national government, but also against encroachment by other States or factions of States. The territorial restraint on state taxing and regulatory power contained in *Quill* and *National Bellas Hess* is one imperfect, but necessary, substitute for some of the degraded textual and structural requirements of horizontal federalism.

## I. The Constitution's Horizontal Federalism Uses Territoriality, Mobility, and Access to National Markets to Create Systemic Checks on State Abuse or Overreach.

"The great difficulty" in forming "a government which is to be administered by men over men," James Madison wrote, is that "you must first enable the government to control the governed; and in the next place oblige it to control itself." Federalist No. 51, *supra*, at 348. The horizontal and competitive structure of federalism does precisely the latter vis-à-vis the States. It sets them up to provide competitive checks on each other by limiting their extraterritorial authority and by ensuring citizens and businesses the option of effective exit from any given State's control without forfeiting access to interstate commercial markets.

### A. Horizontal Federalism Embodies a Firm Principle of State Territoriality.

States, for constitutional purposes, are *equal* States, and they are *territorial* States. Laycock, *Equal Citizens of Equal and Territorial States*, 92 COLUM. L. REV. at 250-51. Those postulates, and territoriality in particular, run through the entire constitutional structure. States are the places where Senators and Representatives come from, and those delegates must be "Inhabitant[s]" of the electing State. U.S. CONST., art. I, secs. 2, 3. States may not be joined, and a new State may not be established within the jurisdiction of an existing State, "without the Consent of the Legislatures of the States concerned as well as of Congress," *id.*, art. IV, sec. 3.

The United States "shall" guarantee each State protection against invasion. *Id.*, art. IV, sec. 4. A duty on imports or exports is a duty on goods that cross a physical state border. Commerce *among* the States is commerce that originates in one State, crosses a physical and jurisdictional border, and ends up in another State.

The territoriality principle goes hand-in-hand with a prohibition: as a matter of elementary federalism logic, States may not tax, regulate, or otherwise exercise authority over parties or transactions beyond their jurisdiction. This injunction follows naturally from the principles of state autonomy and equality: each State's right to tax and regulate its own citizens entails the right of sister-States to do likewise.

The Constitution's text and structure powerfully illustrate the Founders' apprehension of extraterritorial exercises of state authority, prominently including the power to tax. For example, the Import-Export Clause is a prohibition on extraterritorial imposts or duties (regardless of the precise form of the imposition). *See Brown v. Maryland*, 25 U.S. (12 Wheat.) at 437-38. The Tonnage Clause serves the same purpose. *Polar Tankers v. City of Valdez*, 557 U.S. 1, 6-7 (2009). These particularized prohibitions embody the overarching structural constitutional command that power be tied to territory. "[I]t would be impossible to permit the statutes of [one State] to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the

Government under the Constitution depends." *New York Life Ins. Co. v. Head*, 234 U.S. at 161.

That elementary insight has remained with us to this day. For example, for purposes of general jurisdiction, a defendant corporation must have its physical home in the jurisdiction (or else, consent to jurisdiction by way of incorporation). *Daimler AG v. Bauman*, 571 U.S. --, 134 S. Ct. 746, 760 (2014). Somewhat closer to the present question, "[t]he mere fact that the effects of [a State law] are triggered only by sales of [a commodity] within the State * * * does not validate the law if it regulates the out-of-state transactions of [producers] who sell in-state." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 580 (1986).

Time and again, this Court has emphasized that this jurisdictional principle applies with full force to state taxation. *See, e.g.*, *Farmers' Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 210 (1930) ("[N]o state may tax anything not within her jurisdiction without violating the Fourteenth Amendment") (case citations omitted). While this Court derived the principle in varying forms and formulations, it considered the principle "so obvious that no adjudication should be necessary" to establish it. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905).

Admittedly, "formalistic" distinctions – between interstate commerce and the States' internal affairs; between "direct" and "indirect" imposition on interstate commerce; between a non-citizen's consent to jurisdiction and forbidden, extraterritorial exercise of jurisdiction – often have proven difficult. *See, e.g.*, *Quill*, 504 U.S. at 309-10 (describing the difficulties

in the context of the dormant Commerce Clause). But whatever the efforts to overcome such line-drawing difficulties, the resulting rules must remain constitutionally – *i.e.*, territorially – grounded.

### B. The Constitution's Horizontal Safeguards Ensure Citizen Mobility and Access to a National Market.

While the Constitution imposes territorial limits on States, it simultaneously ensures national mobility of persons, goods, and capital among the States. Through various structural and textual means, it guarantees each citizen free entry and exit to and from different States, and access to a national commercial market.

The Privileges and Immunities Clause of Article IV, sec. 2, and section 1 of the Fourteenth Amendment, promote mobility of persons and allow entry and exit between States without facing discrimination from destination or transit States. *See, e.g.*, *Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948) (purpose of the Privileges and Immunities Clause was to "insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy" and "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State"). And section 1 of the Fourteenth Amendment provides that citizens of the United States are citizens of any State in which they choose to reside, ensuring free exit and entry between and among the States. U.S. CONST., Amend. XIV, sec. 1. The Commerce Clause committs to Congress, ra-

ther than to the States, the power "to regulate Commerce * * * among the several States." U.S. CONST., art. I, sec. 8. It thus provids, at a minimum, the opportunity to check state interference with access to the national market for interstate commerce.[2]

Other provisions likewise protected access to the national market. Article I, sec. 10 includes a number of absolute or conditional restrictions on state conduct that would interfere with national access to interstate markets or allow States to exercise control beyond their individual borders. For example, States may not, absent congressional consent, "lay any imposts or duties on imports and exports" except for the narrow purpose of funding inspection laws (and even then, any excess must be remitted to the national government). U.S. CONST., art. I, sec. 10, cl. 3. As Justice Thomas comprehensively documented, this clause is properly understood as applying to imports

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[2] The delegation of the commerce power to the national government arguably went further and removed from the States the power to regulate interstate commerce, at least as such commerce was originally and narrowly conceived. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 493 (1941) ("On the whole, the evidence supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the federal government presupposed the withdrawal of authority pari passu from the states."). Regardless whether one agrees with such a strong preclusive view, the delegation certainly negated any otherwise-extant *presumption* that such power was "reserved" to the States. *See* U.S. CONST., Amend. X (defining those rights "reserved" to the States or to the people to include only those "*not delegated* to the United States by the Constitution" nor otherwise "prohibited" to the States) (emphasis added).

and exports between the States, not merely to or from foreign countries. *Camps*, 520 U.S. at 621-36 (Thomas, J., dissenting). Similarly, the Compact Clause, U.S. CONST., art. I, sec. 10, cl. 3, prohibits States from entering into any Agreement or Compact with one another (or with a foreign power) without the consent of the Congress. Each of these provisions, and various others, helps reduce barriers to interstate commerce, prevent collusion among States that might undermine effective exit or interstate market access, and generally limits a State's authority to its own territory.

Critically, many of these safeguards are self-executing and judicially enforceable. Unapproved compacts can be challenged by persons injured thereby. Denials of privileges and immunities are likewise subject to challenge in the courts. Indeed, the judiciary plays a central role in maintaining the conditions and rules under which political actors can operate to check each other in the manner the Constitution intended.

### C. Horizontal Federalism Ensures Competition among States and Political Accountability.

The various elements of horizontal federalism directly serve to check specific potential abuses of power by state governments. But perhaps the most meaningful check created by horizontal federalism is state competition for freely mobile citizens and businesses that can exit and escape any State or States that seek to overreach. That systemic check exemplifies the Constitution's structural approach.

The Constitution uses the familiar approach of arranging government relations such that "rival institutions can be made to check one another. The occupants of the various branches of government must be given the necessary constitutional means, and personal motives, to resist encroachment of the others * * * Ambition must be made to counteract ambition." Federalist No. 51, *supra*, at 347-48. While such an approach is oft-celebrated at the national level in the separation-of-powers context, it manifests also in the roles and limits the Constitution sets out for the States.

Given the horizontal structures of federalism – territorial constraints on state power, mobility, and access to the national market – "voting with one's feet" becomes a more viable option. Mobile citizens and businesses thus become "consumers" of State government and States must compete for their presence and citizenship.[3]

Where the preconditions for such competition are protected, the motives and ambitions of separate States each operate to check the behavior of the others. The mobility provided by horizontal "federalism will enable citizens to choose among varying bundles of public services and the taxes that come with them, and it will force the [state] governments to compete

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[3] State representation in the House of Representatives based on population, U.S. CONST., art. I, sec. 2; *id.*, Amend. XIV, sec. 2, demonstrates both a residency/territorial basis for participation in the national legislature and establishes an incentive to compete for citizens. In such circumstances, citizens voting with their feet quite literally translates to greater or lesser political power – votes in the House – for any given State.

for productive citizens and firms." Michael S. Greve, THE UPSIDE-DOWN CONSTITUTION 6 (2012). If one State overreaches or abuses those within its territory, citizens and businesses will relocate to more appealing States without having to forfeit access to commerce with the market in their former State or in other States. The "principal constitutional advantage" of such citizen mobility "is to discipline governments." *Id.* at 7; *see also Gregory v. Ashcroft*, 501 U.S. at 458 (structure of federalism "makes government more responsive by putting the States in competition for a mobile citizenry").

In many ways, promoting horizontal competition among the States is a constitutional safeguard comparable to Madison's solution for political factionalism. The solution to factionalism, and the particularly dangerous faction of the "superior force of an interested and overbearing majority," was to have multiple competing factions that would rival and check each other, thereby making more difficult any dangerous combination or exercise of power. Federalist No. 10, *supra*, at 48-49. Ensuring horizontal state competition operates in an analogous manner.

It bears emphasizing that federalism's "numerous advantages," *Gregory*, 501 U.S. at 458, depend on federalism's horizontal safeguards and especially on a principle of territoriality. Little if anything would be left of those advantages if States could erect trade barriers, troll after their own citizens (or for non-citizen taxpayers), export the costs of their experiments, and escape accountability for the results. "[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be

alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 n. 2 (1945). Territorial constraints on state power, coupled with the other foundations of horizontal federalism, thus are critical to the competitive safeguards the Constitution created.

## II. The Erosion of Constitutional Safeguards Necessitates Compensatory Doctrines to Preserve the Fundamentals of Horizontal Federalism.

While horizontal federalism is woven deep into the fabric and structure of the Constitution, various elements of such federalism have been eroded by the progressive creep of overly narrow constitutional construction. Justice Thomas has comprehensively detailed the erroneous demise of the Import-Export Clause as a restriction on state taxation of interstate commerce. *Camps*, , 520 U.S. at 621-36.

The Contract Clause, another provision intended to protect interstate trade from state machinations, likewise is much diminished. *See* McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. at 284-85, 293-94. In the view of Hamilton and others, laws interfering with contracts were often directed against citizens of other States. "Laws in violation of private contracts * * * amount to aggressions on the rights of those States whose citizens are injured by them." Federalist No. 7, *supra*, at 40. The Contract Clause and other prohibitions were "needed principally to protect against parochial legislation with effects on out-of-state business that disrupt the flow of

national commerce." McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. at 285. Current jurisprudence, however, has significantly diminished the Contract Clause's application to interference with private contracts and has tended to emphasize interference with a State's own contracts. But that "modern thrust of contracts clause jurisprudence is precisely backwards," and it was state aggression against the citizens of other States and their private contracts in interstate commerce that was the primary object of the Clause. *Id.* at 293-94. As a result of such inverted jurisprudence, the Contract Clause is weakened as a component of horizontal federalism.[4]

Territorial contraints on the States likewise suffered in the wake of expansive notions of state-court

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[4] The Compact Clause suffered a similar diminishment, with many agreements among States no longer deemed subject to the Clause's congressional approval requirements. *See Multistate Tax Comm'n*, 434 U.S. 452 . Agreements not deemed to threaten vertical federalism were largely excluded from the otherwise straight-forward language of the Clause, and the previously recognized additional role of the Clause in regulating the horizontal relations among States, and restricting collusion against each other, largely faded away. *Compare Id.* at 471 (limiting Compact Clause to agreements or combinations "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.") (citation and internal quotation marks omitted), *with id.* at 495-96 (White, J., dissenting) (noting that "encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority," criticizing the majority for minimizing such concerns, and concluding that the "Compact Clause is an important, intended safeguard within our constitutional structure" that requires Congress to "review interstate agreements that are capable of affecting federal or other States' rights").

personal jurisdiction over out-of-state defendants. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 558-561 (1997) (describing shift from territorial approach of *Pennoyer v. Neff*, under which " 'no State can exercise direct jurisdiction and authority over persons or property outside its territory' " to the "minimum contacts" approach of *International Shoe*, which depended on notions of general fairness rather than state territorial sovereignty) (citations omitted); Greve, THE UPSIDE-DOWN CONSTITUTION 234 (noting erosion, beginning with *International Shoe*, of "[t]raditional territorial rules of jurisdiction" in favor of a rule where "virtually any passing contact with the forum jurisdiction subjects an out-of-state party to suit"). Because the exercise of judicial authority compatible with the Due Process Clause was no longer thought to require the defendant's physical presence in a jurisdiction, States quite literally were able to exert increased extraterritorial authority over out-of-state defendants. *Quill*, 504 U.S. at 307-08.

These and other available examples illustrate the erosion of fundamental assumptions regarding territorial and other limits on state power, and have had the likely unintended consequences of threatening the basic textual and structural foundations of horizontal federalism.

But where past errors created a structural gap, alternative jurisprudence often arose to fill that gap. Such alternatives were sometimes underinclusive, overbroad, or both, relative to the original structure and textual provisions. Even so, they preserved some of the functionality of horizontal federalism.

The dormant Commerce Clause, for example, filled the vacuum created by the removal of textual and structural checks to state interference with interstate commerce and mobility. The theory was less tied to the text and structure, had internal inconsistencies, and smacked of judicial policy making, but it was ultimately necessary to shore up the overall structure and function of the Constitution's horizontal federalism. *Quill*'s operative physical-presence rule is a territorial rule. In that crucial respect, the rule preserves, however awkwardly, a piece of the constitutional architecture. Such background federalism concerns should frame how this Court approaches the case at hand, and the broader role *Quill* plays in that now-precarious architecture.

*Amicus* recognizes that many of these problems arise from this Court's other binding precedents. But, if the point of the current case is to *question* precedent, we should question the relevant area in its entirety, not merely single out one isolated example of a twisted branch growing from a twisted tree. Allowing narrowly framed individual decisions to push horizontal federalism down the garden path to destruction is neither sensible nor appropriate. A broader perspective is required because otherwise a "federal judiciary that surrenders at the horizontal federalism front has surrendered the Constitution's competitive architecture." Greve, THE UPSIDE-DOWN CONSTITUTION 71.

## III. *Quill*'s Territorial Limit on State Authority Is Superior to an Unbounded Economic Nexus Test.

Notwithstanding the flaws in the current *Quill* rule, a strong territorial principle limiting the exercise of a State's power to its own physical territory or citizens is a proper default rule in many areas, but particularly in the area of interstate commerce. The territorial limits imposed by *National Bellas Hess* and preserved by *Quill* are both quite consistent with the result that would derive from faithful application of horizontal federalism provisions and structure. That those cases rely on imperfect theories under the Due Process or dormant Commerce Clauses is no reason to reject their otherwise appropriate rule. Indeed, the challenge to the physical-presence rule depends just as much on the oft-criticized judicial policy making of dormant Commerce Clause analysis as did the cases adopting that rule.[5]

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[5] Arguments regarding the economic efficiency of tax neutrality, tax harmonization, or tax efficiency are little more than efforts to drag this Court into an inappropriate policy-making role and have no constitutional warrant. Just as efficiency is manifestly not the point of the separation of powers, technical efficiency likewise is not the point of federalism. Vertically, federal-state relations might work much more smoothly if Congress could commandeer States; but it may not. *Printz v. United States*, 521 U.S. 898, 931-32 (1997) (declining to balance efficiency concerns against structural constraints imposed by state sovereignty). In many ways, structural inefficiency is the intended barrier to overreaching, collusion, or the threat of a majority faction. A *de facto* tax collection cartel would undoubtedly promote the "efficient" collection of sales and use taxes. It is nonetheless antithetical to the Constitution's federalism.

A territorial baseline limit for state taxation and regulation of interstate commerce is superior to South Dakota's economic nexus theory of state power. Participation in the national market and interstate commerce is protected from state regulation, not a justification for it. A foundational assumption of the Constitution is that all States and their citizens benefit from interstate commerce, and that citizens of all States are the market for such commerce. To treat access to consumers as a resource belonging to the State and for which the State can demand payment or compel services creates the very economic balkanization the Constitution sought to avoid.

Furthermore, the principle is limitless. If consumption by South Dakotans is a benefit for which the State can charge, then it would apply equally to all manner of goods and services. Legal services provided anywhere in the country to clients from South Dakota would be subject to taxation or regulation as a means of compensating South Dakota for providing legal consumers. Purchases by South Dakotans at brick and mortar stores in other States likewise provide the retailers with the benefits of South Dakota's support for its citizens and hence their purchasing power. The logic of consumers as a resource provided by the State, and for which the State may exact payment, means that an economic nexus is *always* satisfied for interstate commerce.[6]

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[6] The seeming limits on state authority suggested by South Dakota – significant economic activity, ease of compliance, presence of virtual store-fronts via the internet, apportionment – are ephemeral and unrelated to the legal theory it proposes. If sellers must pay or provide services for the "benefit" of inter-

South Dakota's touting of the virtues of a Congressionally unapproved agreement among a faction of the States to facilitate an interstate sales-tax collection scheme, Pet. Br. 13, thumbs its nose at the text of that Clause and illustrates how its approach undermines horizontal and competitive federalism in favor of state collusion and tax cartelization.[7]

By contrast, physical presence is not a proxy for some inchoate "nexus" that would justify regulation as a policy matter. Pet. Br. 1-2. Rather, it is a structural element of competitive horizontal federalism that cabins state projection of power beyond its borders and allows mobility, exit, and competition to discipline state tendencies to overreach and collude. That structural principle does not ask the courts to balance competing claims to fairness or the economic costs and benefits of varying tax regimes. It simply asks courts to enforce territorial boundaries because that is the constitutional scheme.

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state access to South Dakota consumers, then the level of activity, ease of collection, and even apportionment are irrelevant, except from a strictly utilitarian perspective. Likewise, basing claimed authority "vitual" storefronts in South Dakota targets a near-universal circumstance that provides no limit on state power, but merely an excuse to regulate interstate commerce.

[7] That the States have *needed* a multilateral sales and use tax agreement demonstrates the national nature of the activity and the broader policy issues involving rates, apportionment, and interstate enforcement that should be addressed, or at least approved, by Congress. And it demonstrates how a faction of the States can combine in a manner potentially adverse to the interests of their sister States or their own citizens by replacing competition with collusion.

Viewed in isolation, the reasoning of *Quill* may seem questionable on its narrow terms but, understood in relation to the prior deviations from constitutional text and structure, the physical-presence rule helps restore the original functioning of the Constitution's horizontal and competitive federalism. While flawed rationales for rules should be corrected where appropriate, it makes no sense, and is affirmatively destructive, to correct only the compensatory doctrine without correcting the underlying errors that drove such compensation.

Acceding to South Dakota's request to eliminate *Quill*, without reanimating the horizontal protections for which it substituted, would invert the architecture of competitive federalism and lead to the very ills the Constitution sought to prevent: state predation on citizens of other States, weakening of exit as a means of escaping state authority, and state collusion against the public and against sister-States. The courts, enforcing a structural default rule, are the proper agents for defending and maintaining the constitutional structure of horizontal federalism.

The lack of Congressional legislation providing the interstate taxing and collection authority South Dakota desires, Pet. Br. 21, 54, is reason to maintain the *Quill* rule, not abandon it. It is *supposed* to be difficult to legislate at the national level, and such difficulty often reflects a lack of consensus. That South Dakota and other States seeking to commandeer outsiders for tax-collection services have failed to win Congress to their cause is the *result* of the political process, not a failure thereof. Such failure to reach a compromise agreeable enough to be enacted shows

exactly the political nature of the issue and exactly why the Court should not step in now. Sometimes the process says "no," or perhaps merely "not yet." This is ultimately a policy debate regarding core interstate commerce, and that debate must be resolved by Congress.

This Court long ago placed the choice for further action on this issue firmly in Congress's hands, and there it should remain. Indeed, businesses have relied on the current default rule for many years when deciding how to structure their activities and investments.[8] Those choices carried both costs and benefits, and either way involve the type of reliance justifying adherence to precedent. Congress is far better suited to determining to what degree such investment decisions and economic interests should be respected or accommodated, and to devising a compromise, if needed, that balances the competing interests involved.

Regardless whether this Court would agree, *ex ante*, with its original placement of the presumption against state commandeering the tax-collection services of those not physically present, it is the choice it made and one Congress can overcome at will. Far from the States having to "beg Congress to devolve its own power back to the States," Pet. Br. 49, there is certainly no *presumption* that States retain the power to compel tax collection on interstate Commerce given that only those "powers *not delegated* to the United

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[8] Indeed, those businesses have done what horizontal federalism contemplates – used their mobility and confined state jurisdiction to exit States deemed undesireable and limit their physical presence to more favorable or less burdensome States.

States by the Constitution, *nor* prohibited by it to the States" are deemed "reserved" to the States or to the people. U.S. CONST., Amend. X (emphasis added). Even absent a partially preemptive theory of the Commerce Clause, the Constitution itself implicitly recognizes that States have a weaker claim to powers delegated to the United States. That weaker claim supports leaving the default rule as it currently stands.

For precedential purposes, this case is far more akin to a statutory case where Congress retains the power to alter the net result than it is like a constitutional case imposing an unchangeable substantive rule. The only rule imposed here is to determine that if States are to project power beyond their borders, they must do so with the consent or legislative authorization of Congress. That default rule has ample basis in the text and structure of the Constitution, leaves room for Congress to respond to any policy concerns raised by petitioner, and hence does not warrant this Court's reconsideration.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Supreme Court of South Dakota.

Respectfully submitted,

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